

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RAHIM MULTANI,

Plaintiff and Appellant,

v.

JONATHAN G. GABRIEL et al.,

Defendants and Respondents.

B248746

(Los Angeles County
Super. Ct. No. BC467095)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kevin C. Brazile, Judge. Affirmed.

Rahim Multani, in pro. per., for Plaintiff and Appellant.

Jonathan G. Gabriel, in pro. per.; GabrielSalomons and David S. Mayes for
Defendants and Respondents.

* * * * *

Plaintiff Rahim Multani appeals from the judgment of dismissal entered after the trial court sustained the demurrer of defendants Jonathan G. Gabriel and Jonathan J. Gabriel, a Law Corporation, to his first amended complaint, without leave to amend.¹ Finding plaintiff's claims sound in malpractice, and are barred by the one-year statute of limitations for attorney malpractice, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The first amended complaint² alleges causes of action for breach of fiduciary duty, constructive fraud, fraud by concealment, and unfair business practices. Defendants represented plaintiff in *By Design Automotive, Inc. v. Sam Hakim et al.*, (Super. Ct. L.A. County, 2010, No. BC333576; the Hakim action), and *Rahim Multani v. Trinity Universal Insurance Company*, (Super. Ct. L.A. County, 2008, No. BC364431; the Trinity action). The thrust of the complaint is that defendants simultaneously represented plaintiff and his business partner, Michael Mansouri, and that conflicts existed between them.

¹ Plaintiff did not include the notice of appeal in his appellate appendix. However, the May 7, 2013 notice of appeal, purporting to appeal the trial court's March 8, 2013 order sustaining defendants' demurrer, was transmitted to this court by the superior court. (Cal. Rules of Court, rule 8.100(e).) Plaintiff's appellate appendix also did not include the trial court's judgment of dismissal. A ruling on a demurrer is not an appealable order. (*Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120.) However, we later received a copy of the judgment of dismissal, which was entered on July 30, 2013. Because plaintiff's notice of appeal was filed before the judgment of dismissal, it was premature. However, we may treat a premature appeal from a nonappealable order sustaining a demurrer without leave to amend as an appeal from the subsequent judgment of dismissal. (*Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1353, fn. 5.)

² Plaintiff's initial complaint was filed on August 5, 2011. Defendants demurred and moved to strike portions of the complaint, but their motions were taken off calendar when plaintiff was permitted to file a first amended complaint with leave of the trial court. Since none of these documents or minute orders are included in the appellate record, we exercise our discretion to take judicial notice of the trial court's case summary, evidencing the filing of these various documents and orders.

We now summarize the relationship between plaintiff and his former business partner, Mansouri, as described in the first amended complaint. Plaintiff and Mansouri met in 1996. Mansouri asked plaintiff to invest in Mansouri's business, By Design Automotive. Between 2000 and 2005, plaintiff invested over \$570,000 in By Design Automotive. In 2003, plaintiff became an officer on the company's board of directors, and was a signatory to its bank accounts. Mansouri made a number of misrepresentations to plaintiff, including a false promise that business decisions and major expenditures would not be made without plaintiff's approval, and that plaintiff would become a full partner in By Design Automotive with a 50 percent share in the business by 2004.

In 2003, Mansouri wanted to expand By Design Automotive to West Hollywood by taking over a showroom that was operated by Sam Hakim. Plaintiff advised against the move, but Mansouri took over the existing lease for the showroom.

In 2004, plaintiff started seeking buyers for By Design Automotive, and the business was listed for sale for \$3 million with a business broker. When potential buyers started coming forward, Hakim said he also had a potential buyer for the business. Mansouri met with Hakim, who said his prospective buyer would require plaintiff's commitment to the business until April 2006. Mansouri assured plaintiff that he would be repaid his investment in By Design Automotive when the sale was set to close, in April 2006.

Meanwhile, in November 2004, Mansouri obtained a contract from Motorola to film a documentary, worth an initial payment of \$60,000 and another final payment of \$300,000. Mansouri assured plaintiff that at least \$77,254.68 of these funds would be paid directly to plaintiff. However, Mansouri failed to pay plaintiff any funds from the Motorola contract, urging instead that plaintiff should collect an outstanding insurance claim with Zurich Insurance for a theft that occurred at By Design Automotive's warehouse. Plaintiff retained the attorney defendants to help expedite securing payment of the insurance claim, and to assist with other matters, in January 2005.

In January 2005, Mansouri went to Italy, leaving Sam Hakim to oversee the operation of By Design Automotive, and giving him access to business computers and

financial records. Plaintiff was in contact with Mansouri while he was in Italy, and they discussed By Design Automotive's operations. When Mansouri returned in March 2005, Mansouri agreed to meet with plaintiff to discuss pursuing legal claims against Hakim.³ From the allegations in the first amended complaint, it appears that Mansouri was experiencing financial distress. Plaintiff and Mansouri agreed that plaintiff would pursue the business's receivables, that Mansouri's interest in the business would be transferred to plaintiff, that any recovery from Hakim would belong to plaintiff, that Mansouri would not file bankruptcy, and that plaintiff would help Mansouri deal with his creditors.

Shortly after plaintiff retained defendants, they drafted a bulk asset sale agreement and power of attorney for plaintiff to facilitate the business's transfer to plaintiff. These documents were edited a number of times. Defendants sent plaintiff the final versions on February 5, 2005, and plaintiff forwarded them to Mansouri for his signature. When plaintiff did not hear from Mansouri, he instructed defendants to email the documents directly to Mansouri on February 15, 2005. In late February, Mansouri agreed to sign the documents, and agreed to meet with plaintiff and defendants in early March 2005.

When plaintiff arrived at defendants' office on March 11, Mansouri was already there, meeting with defendants. Plaintiff was eventually invited to join the meeting, and the parties discussed how the sale was structured and how the assets were to be transferred to plaintiff. Defendants presented plaintiff and Mansouri with a copy of the asset sale agreement to sign, and it was executed by Mansouri and plaintiff. However, unbeknownst to plaintiff, the version of the agreement he signed varied from the final version of the agreement he had approved in February. Plaintiff did not agree to indemnify Mansouri, but the agreement contained an indemnity clause, providing that "Buyer will defend Seller and the Seller's principal, Michael Mansouri, from and against any and all claims that have arisen in the ordinary course of Seller's business." The agreement also newly provided that "Seller acknowledges that following the sale, Seller

³ The nature of the claims against Hakim is unclear.

will cause the Corporation known as By Design Automotive, inc to be dissolved,” even though defendants had advised plaintiff to cause By Design Automotive to sue Hakim.

After the agreement was executed, defendants instructed Mansouri to file bankruptcy, even though plaintiff and Mansouri had agreed he would not file bankruptcy. Mansouri filed a Chapter 7 case on March 22, 2005.

In April 2005, plaintiff told Zurich Insurance to correspond with defendants concerning the open insurance claim for the theft. He gave the insurance file to defendants, and instructed them to send Zurich a letter informing Zurich that defendants were representing plaintiff to collect the proceeds for him. Weeks later, plaintiff discovered that defendants did not correspond with Zurich, and plaintiff retrieved the file and retained another attorney to handle the matter. The new attorney discovered that Zurich had been contacted by Mansouri, and that the insurer had paid the claim, for approximately \$100,000, to Mansouri. Plaintiff’s new counsel was able to have the payment cancelled. Mansouri asked plaintiff to split the payment with him, and to conceal it from the bankruptcy trustee. Plaintiff did not cooperate; as the owner of By Design Automotive’s assets, the insurance payment belonged to him. To protect his interests, plaintiff drafted an adversary complaint to be filed in Mansouri’s bankruptcy, and emailed it to defendants on March 17, 2006. Defendants revised the adversary complaint, and advised plaintiff that it would be filed before the bankruptcy court’s deadline. No adversary complaint was filed by defendants.

On May 17, 2005, defendants filed the Hakim action (see p. 2, *ante*), and also included as a defendant Shahik Mardeross, the landlord of one of By Design Automotive’s locations. Mansouri signed the verified complaint, although he had no interest in By Design Automotive at this time. Over the months of January and February 2006, plaintiff independently negotiated a settlement with Mardeross, whereby Mardeross would pay plaintiff \$5,000 cash and give plaintiff a Mercedes. Plaintiff requested that defendants attend a meeting to execute a settlement agreement. An attorney from defendant firm, Neil Richman, agreed to appear at the meeting, forged defendant Gabriel’s signature on the settlement agreement, and directed Mandeross to

pay the \$5,000 to the firm's trust account. Defendant Gabriel then refused to release the funds to plaintiff. When plaintiff protested, defendants threatened to withdraw from their representation of plaintiff.

On March 22, 2006, the Chapter 7 trustee in Mansouri's bankruptcy case filed a lawsuit against plaintiff, seeking indemnification in an amount exceeding \$700,000 based on the indemnity clause in the asset sale agreement, and alleging the asset sale was a fraudulent transfer, and other claims. Plaintiff had retained other counsel to address issues arising from the Chapter 7 bankruptcy, and his new attorney made numerous attempts to contact defendants to seek clarification about the asset sale agreement. Plaintiff incurred legal fees simply attempting to contact defendants.

Despite all this, in 2007, plaintiff asked defendants to represent him in the Trinity action (see p. 2, *ante*), with the goal of collecting a default judgment plaintiff had obtained in an action involving an auto accident. However, defendants failed to attend several hearings, and plaintiff was sanctioned \$7,500. Plaintiff had to retain new counsel, who was able to negotiate a settlement of only \$5,000 for a default judgment that was worth over \$30,000. Defendants billed plaintiff for \$6,500 in legal fees despite their mishandling of this matter.

On May 21, 2007, plaintiff filed a counterclaim against the bankruptcy trustee. Eventually, in March 2008, plaintiff and the trustee reached a settlement, whereby the trustee agreed to pay plaintiff a portion of the insurance claim and assign him the rights to any recovery in the Hakim action. Plaintiff suffered litigation costs associated with the bankruptcy as a result of the unauthorized indemnification clause in the asset sale agreement, and because Mansouri filed bankruptcy in contravention of his agreement that he would not do so.

In 2008, plaintiff had to travel extensively for business. Before departing, he ensured that defendants had been paid so that they would continue representing him in the Hakim action. Nevertheless, in July 2008, defendants filed a motion to be relieved as counsel in the Hakim action, claiming that plaintiff had not paid their legal fees. Not only had defendants been paid in full, but there should have been a credit balance, as

defendants received \$3,500 in sanctions the court had ordered Hakim to pay in the action. After defendants withdrew as counsel, the Hakim action was dismissed on October 31, 2008. Plaintiff was forced to retain new counsel to attempt to have the dismissal set aside. In November and December 2008, plaintiff attempted to retrieve the file from defendants for the Hakim action. Defendants did not give him the file. When plaintiff went to their office to obtain the file, defendant Gabriel told him to leave. Eventually, plaintiff's new attorney was able to obtain the file. On April 30, 2009, when plaintiff examined the file, he discovered Hakim's \$3,500 payment.

Plaintiff's cause of action for breach of fiduciary duty alleges that plaintiff was defendants' client between 2005 and 2008, and that defendants represented both plaintiff and Mansouri, notwithstanding plaintiff's conflict of interests with Mansouri. This cause of action also alleges that defendants wrongly added the indemnity clause in the asset sale agreement for the benefit of Mansouri. Plaintiff also alleges that defendants failed to disperse funds obtained in the Hakim action to him. The first amended complaint alleges "[p]laintiff did not and could not reasonably have discovered the alleged breaches of fiduciary duties and corresponding violations until no earlier than April 2009, when Plaintiff for the first time reviewed the file that was obtained from Defendants. The file contained information that set forth in detail the misconduct of the defendants."

The remaining causes of action are based on the same facts as the breach of fiduciary duty claim. The causes of action for constructive fraud, fraud by concealment, and for violation of the unfair competition law all allege that defendants violated duties owed to plaintiff by their representation of Mansouri, and by failing to disclose that a conflict existed between plaintiff and Mansouri.

Defendants demurred on the ground that plaintiff's claims were barred by the one-year statute of limitations for attorney malpractice. Plaintiff opposed the demurrer, arguing the statute of limitations was tolled by defendants' fraudulent conduct. The trial court sustained the demurrer without leave to amend.

DISCUSSION

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When a demurrer is sustained without leave to amend, as it was here, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Ibid.*) “The plaintiff bears the burden of proving there is a reasonable possibility of amendment. . . . [¶] To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ . . . The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ . . . and the legal basis for amendment, i.e., the elements of the cause of action and authority for it.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44, citations omitted.)

Defendants contend that all of plaintiff’s claims arise from attorney malpractice, and that the one-year statute of limitations set forth in Code of Civil Procedure section 340.6 applies. Section 340.6, subdivision (a) applies to “[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services” “In all cases other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, the one-year statutory period [set forth by section 340.6] applies.” (*Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805; see also *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880 [section 340.6 applies to an action for malicious prosecution against an attorney, rather than the limitations period applying to malicious prosecution generally]; *Callahan v. Gibson, Dunn & Crutcher* (2011) 194 Cal.App.4th 557, 567, fn. 5 [section 340.6 applies to claim for breach of fiduciary duty]; *Quintilliani v. Mannerino*

(1998) 62 Cal.App.4th 54, 67-70 [section 340.6 applies to causes of action for breach of fiduciary duty and negligent misrepresentation].)

Plaintiff contends his claims are not time barred. Specifically, he contends that the longer statutes of limitation for breach of fiduciary duty, fraud, and unfair business practices apply. Alternatively, plaintiff contends that he can amend his complaint to allege that he first discovered in 2011 that Mansouri paid legal fees to defendants, and can therefore allege claims within the one-year limitations period of Code of Civil Procedure section 340.6. We are not persuaded.

“ ‘To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the “gravamen” of the cause of action.’ [Citation.] The nature of the cause of action and the primary right involved, not the form or label of the cause of action or the relief demanded, determine which statute of limitations applies.” (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 412.)

Plaintiff’s claims arise from defendants having drafted the asset sale agreement with an indemnity clause, concurrently represented Mansouri, and retention of Hakim’s \$3,500 sanctions payment. The gravamen of plaintiff’s claims is that defendants breached their fiduciary duties and duty of loyalty owed to plaintiff, by mishandling funds and by favoring the interests of another client over plaintiff. Although plaintiff has attempted to style his claims as species of fraud (that defendants concealed their concurrent representation, or actively lied about it), plaintiff may not recast claims as fraud to avoid the statute of limitations relating to attorney malpractice. (See, e.g., *Rubin v. Green* (1993) 4 Cal.4th 1187, 1201-1202 [claims cannot be recast as unfair competition claims to avoid statutes of limitation]; see also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-283 [breach of duty of loyalty by representing adverse party is professional negligence].) If undisclosed concurrent representation constituted fraud, artful pleading would bring all such claims outside the limitations period of Code of Civil Procedure section 340.6, which has been applied broadly to claims against attorneys, including claims for breaches of fiduciary duty, negligent misrepresentation, and other torts. (See

Levin v. Graham & James, supra, 37 Cal.App.4th at p. 805; *Callahan v. Gibson, Dunn & Crutcher, supra*, 194 Cal.App.4th at p. 567, fn. 5; *Quintilliani v. Mannerino, supra*, 62 Cal.App.4th at pp. 67-70.)

Accordingly, plaintiff's claims had to be filed "within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." (Code Civ. Proc., § 340.6, subd. (a).) For statute of limitations purposes, "a plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111.)

The first amended complaint alleges that in 2005, plaintiff discovered Mansouri meeting alone with plaintiff's attorneys, and that after this meeting, plaintiff discovered he had signed a sales agreement that differed materially from the one he had approved, and which benefited Mansouri by including a clause that indemnified Mansouri. Plaintiff discovered the indemnity clause when he was sued by Mansouri's bankruptcy trustee on March 22, 2006. These facts demonstrate that plaintiff was on inquiry notice of defendants' wrongdoing in at least March 2006, regardless of any later discovery of payments made by Mansouri to defendants. Before then, in 2005, plaintiff discovered that defendants had failed to follow his instructions to notify Zurich Insurance to make an insurance payment to plaintiff. Also in 2006, after plaintiff negotiated a settlement with Mardeross by which Mardeross agreed to pay plaintiff \$5,000 and give him a Mercedes, defendant instead told Mardeross to pay the \$5,000 to the firm's trust account and refused to release the funds to plaintiff.

Defendants stopped representing plaintiff in 2008, some three years before this action was filed. (Code Civ. Proc., § 340.6, subd. (a)(2) [the statute of limitations is tolled while the "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred"].) Plaintiff

discovered no later than April 2009 when he obtained the file from defendants in the Hakim action that defendants had wrongfully withdrawn from representing plaintiff and retained funds Hakim paid to them in that action. At best, the limitations period was tolled until April 30, 2009, yet plaintiff did not file this lawsuit until August 5, 2011, more than two years later.

Even if we were to construe the allegations that defendants surreptitiously inserted the indemnity clause into the asset sale agreement in 2005 as alleging fraud rather than attorney malpractice, plaintiff's claims would be time barred. That is the only allegation in the first amended complaint which potentially rises to the level of actual fraud. The three-year limitations period applicable to fraud would bar plaintiff's claims, as plaintiff was on inquiry notice in 2006 when the bankruptcy trustee sued him for indemnity, yet this action was not filed until 2011. (See Code Civ. Proc., § 338, subd. (d).)

During oral argument, plaintiff urged that the "continuous representation" tolling provision of Code of Civil Procedure section 340.6, subdivision (a)(2) applies to this fraud claim, as defendants continued to represent plaintiff within three years of the filing of this lawsuit. We are not persuaded. By its terms, section 340.6 does not apply to "actual fraud." (*Id.* at subd. (a).) Clearly, neither do its tolling provisions. Moreover, the purpose of the continuous representation tolling provision of section 340.6 "is to 'avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'" [Citation.]" (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1495.) This purpose is not served when the attorney-client relationship has been disrupted by fraud, and the client's faith and trust in the attorney has been eroded, as it was here. And, in any event, defendants' representation of plaintiff in the asset sale had ceased long before defendants withdrew from their representation of plaintiff in the Hakim matter. Therefore, section 340.6, subdivision (a)(2) is not applicable. (See *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 228-229 ["The continuous representation rule, as codified in section 340.6, subdivision (a), is not triggered by the mere existence of an

attorney-client relationship. Instead, the statute's tolling language addresses a particular phase of such a relationship--representation regarding a specific subject matter.

Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff."].)

On appeal, plaintiff also urges that "equitable tolling" applies because he did not discover that Mansouri made payments to defendants until 2011, and discovered that defendants may have represented Mansouri as early as 2005. However, the doctrine of equitable tolling does not apply to claims of attorney malpractice. The Legislature intended Code of Civil Procedure section 340.6's explicit tolling provisions to be exclusive. (*Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 980; see also § 340.6.) To the extent that plaintiff's argument can be construed as an argument that delayed discovery tolls the limitations period (one of the enumerated tolling provisions of section 340.6), as discussed above, we have concluded plaintiff had actual or inquiry notice that his attorneys had wronged him as early as 2005 or 2006.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

GRIMES, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.